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SUPREME COURT OF THE UNITED STATES

October Term, 1937

No. 313

LONE STAR GAS COMPANY, *Appellant*,

v.

STATE OF TEXAS, ET AL., *Appellees*

Appeal from the Court of Civil Appeals, Third Supreme Judicial District of Texas

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS

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I.

The Question Raised by the Motion Has Been Settled By Prior Decisions of this Court.

The motion to dismiss is grounded, in main, upon the statement (p. 9) that "the rule observed by this Court in appeals from Texas is in direct conflict with its rule observed in appeals from the State of Ohio,

and perhaps other states." Appellees have accurately stated that the Court has observed a rule in cases brought up from Texas. They concede that the action of the Court in allowing the appeal in this case accords with that rule. That explains the absence of reference by them to any case decided by this Court originating in Texas. Indeed, they say (p. 9) "that the Court has, in several instances, retained jurisdiction of appeals prosecuted from our Courts of Civil Appeals in the circumstances here involved." The statement is a conservative one.

As showing that the rule applicable to cases coming from Texas is more firmly established than is indicated by the above statement, we give below a list of cases that have come to this Court directly from Courts of Civil Appeals of Texas after the Supreme Court of Texas had refused writ of error. We do not list the larger number of cases in which certiorari has been denied, not dismissed. The list does not include any case in which petition for writ of error has been dismissed by the Supreme Court of Texas, for want of jurisdiction, or otherwise.

We hardly see how uniformity may be achieved by dismissing an appeal that has been brought here from Texas in conformity with a test of jurisdiction that has been applied to Texas cases invariably since 1893, as witness the following cases:

Stanley v. Schwalby, 162 U. S. 255;*
Bacon v. Texas, 163 U. S. 207;

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*This was the first case, thus originating, to be decided by this Court but it was in fact the second case brought to this Court directly from a Texas Court of Civil Appeals. The first case was *Bacon v. Texas, supra*, in which the Court

Roller v. Holly, 176 U. S. 398;
Waters-Pierce Oil Co. v. Texas, 177 U. S. 28;
M. K. & T. Ry. Co. v. Ferris, 179 U. S. 602;
Smith v. St. L. & S. W. Ry. Co., 181 U. S. 248;
Waggoner v. Flack, 188 U. S. 595;
Pardee v. Aldridge, 189 U. S. 429;
Greer County v. Texas, 197 U. S. 235;
H. & T. C. Ry. Co. v. Mayes, 201 U. S. 321;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86;
A. T. & S. F. Ry. Co. v. Sowers, 213 U. S. 55;
Morgan's La. & T. R. & S. S. Co. v. Street, 217 U. S. 599;
M. K. & T. Ry. Co. v. Bailey, 220 U. S. 608;
M. K. & T. Ry. Co. v. Richardson, 220 U. S. 601;
T. & N. O. R. Co. v. Gross, 221 U. S. 417;
T. & N. O. R. Co. v. Miller, 221 U. S. 408;
Gaar, Scott & Co. v. Shannon, 223 U. S. 468;
G. H. & S. A. Ry. Co. v. Crow, 223 U. S. 481;
G. H. & S. A. Ry. Co. v. Wallace, 223 U. S. 481;
T. & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111;
M. K. & T. Ry. Co. v. Harriman, 227 U. S. 657;
G. C. & S. F. Ry. Co. v. McGinnis, 228 U. S. 173;
St. L. S. F. & T. Ry. Co. v. Seale, 229 U. S. 156;
Downman v. Texas, 231 U. S. 353;
Paris & Gt. North. R. Co. v. Boston, 231 U. S. 742;
Pacific Exp. Co. v. Rudman, 234 U. S. 752;
S. A. & A. P. R. Co. v. Waggoner, 241 U. S. 476;
Knights of Pythias vs. Mims, 241 U. S. 574;
M. K. & T. Ry. Co. v. Cassady, 242 U. S. 611;
St. L. S. F. & T. Ry. Co. v. Smith, 243 U. S. 630;
M. K. & T. Ry. Co. v. Ward, 244 U. S. 383;
G. C. & S. F. Ry. Co. v. Texas Packing Co., 244 U. S. 31;

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reviewed a case from a Texas Court of Civil Appeals decided in the State court on December 6, 1892, within four months of the date of organization of the Courts of Civil Appeals pursuant to amendment of the Texas Constitution and enabling legislation of that year.

G. C. & S. F. Ry. Co. v. Vasbinder, 245 U. S. 635;
M. K. & T. R. Co. v. Texas, 245 U. S. 484;
G. C. & S. F. Ry. Co. v. Texas, 246 U. S. 58;
I. & G. N. R. Co. v. Anderson County, 246 U. S. 424;
York Mfg. Co. v. Colley, 247 U. S. 21;
Southern Pac. Co. v. Berkshire, 254 U. S. 415;
City Nat. Bank v. El Paso & N. E. R. Co., 262 U. S. 695;
Cobb Brick Co. v. Lindsay, 275 U. S. 491;
I-G. N. R. Co. v. R. R. Comm., 275 U. S. 503;
M. K. & T. R. Co. v. Texas, 275 U. S. 494;
Danciger & Emerick Oil Co. v. Smith, 276 U. S. 542;
T. & P. R. Co. v. Guidry, 280 U. S. 531;
Barwise, et al, Trustees, v. Sheppard, 299 U. S. 33;
Texas & N. O. R. Co. v. Neill, 301 U. S. 674 (granting certiorari);
United Gas Public Service Co. v. Texas (the Laredo Gas case), 301 U. S. 667 (overruling motion to dismiss appeal).

At the last term of this Court two similar motions to dismiss cases, appealed directly to this Court from Courts of Civil Appeals after the Supreme Court of Texas had refused a writ of error, were filed and overruled. *United Gas Public Service Co. v. State of Texas* (the Laredo gas rate case), 301 U. S. 667, and *Texas & New Orleans R. R. Co. v. Neill*, 301 U. S. 674 (certiorari granted).* These

*Motion to dismiss this case was overruled by this Court on June 1, 1937. We are unable to find any report of the Court's order overruling the motion. After hearing argument the writ of certiorari was dismissed on October 25, 1937, because the only substantial question involved was one of local practice.

motions were based upon the grounds now presented by appellees and were supported by the same points of argument. The Texas statutes were elaborately reviewed. The statutory change affecting the Supreme Court of Texas, made in 1927, was greatly emphasized. In the Laredo case the Court was furnished a printed copy of the opinion of the Commission of Appeals of Texas in *Gammel-Statesman Publishing Co.* v. *Ben C. Jones & Company*—the same opinion that is attached to the present motion. The motion in the Laredo case was filed by the counsel presenting the present motion. And in the present motion (p. 9) it is admitted that the question raised was "briefed somewhat more in detail on both sides" in the Laredo case.

The Court's decision *per curiam* on the motion filed in the Laredo case is quoted:

"No. 807. UNITED GAS PUBLIC SERVICE CO. v. TEXAS ET AL. Appeal from the Court of Civil Appeals, Third Supreme Judicial District, of Texas. May 17, 1937. The motion of the appellee to dismiss the appeal is denied. *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269; *Second National Bank* v. *First National Bank*, 242 U. S. 600, 602; *Western Union* v. *Priester*, 276 U. S. 252, 258." (301 U. S. 667, Preliminary Print).

A similar motion to dismiss was made and overruled in 1913 in *St. L. S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 157, as being "plainly untenable."

It would seem that in discharging the responsibility that rested upon counsel for appellant, in attempting to determine from what court the appeal

should be taken, they would hardly have been warranted in disregarding the authoritative precedents, as found in the decisions of this Court in cases thus brought here from Texas. And, in view of the guide furnished by the decisions of this Court reviewing final judgments of the Courts of Civil Appeals, in which writs of error had been refused by the Supreme Court of Texas, we submit that it is beside the point to inquire whether the established practice in cases brought to this Court from "Ohio and perhaps other states" is consistent or inconsistent with that in respect of cases coming from Texas. This consideration derives added force from the circumstance, naturally deemed significant, that among the cases referred to by this Court in its Rules of Court is one that was brought here by writ of error directed to a Texas Court of Civil Appeals after the Supreme Court of Texas had refused writ of error. (Amended Rule 12, 297 U. S. 733, citing *Zucht v. King*, 260 U. S. 174.) That the writ of error in that case was ultimately dismissed by this Court for the want of a substantial Federal question does not detract from, but rather adds force to, the point now made. It indicates that the question of jurisdiction was carefully considered by the Court. It is hardly to be supposed that the Court would have been silent in respect of the point now advanced by the appellees if the Court had then been of the view that it made against jurisdiction. The question of jurisdiction was rendered even more conspicuous by the circumstance that a writ of certiorari had previously been dismissed in the case for failure to comply with the rules of court.

II.

The Order Refusing Application for Writ of Error Does Not Appear "on the Face of the Record" To Be a Judgment of the Supreme Court of Texas on the Merits.

The motion to dismiss invites this Court to go into the intricacies of the State law to determine the nature of the action taken by the Supreme Court in refusing the application for writ of error. The Court has many times held that it will not do this. The settled rule, from which there has been no departure, is that announced in *Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U. S. 264, 269. It was there held that where the court of last resort of a State declines to allow a writ of error or an appeal from a lower State court, this Court will not treat such action as an affirmance on the merits of the judgment or decree of the court below except where this plainly appears "on the face of the record * * * * in express terms of the judgment or decree sought to be reviewed."

The rule there declared was announced as a rule "for the guidance of suitors in the future." (229 U. S. 269.) It has been consistently applied to cases coming to this Court from Texas. The Norfolk & Suburban Turnpike Company case was cited as applicable authority in overruling the motion to dismiss in *St. L. S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156; and in overruling the motion to dismiss *United Gas Public Service Co. v. Texas*, 301 U. S. 667 (Preliminary Print).

The rule announced in the Norfolk & Suburban Turnpike Company case was reaffirmed and restated in *Louisiana Nav. Co. Oyster Comm.*, 226 U. S. 99, 101, decided at the next term of the Court. In that case it was declared that, "this court cannot for the purpose of determining whether its reviewing power exists be called upon to disregard the form of the judgment in order to ascertain whether a judgment which is in form not final might by applying the state law be treated as final in character." And it was further declared that "the confusion and contradiction which inevitably arose from resorting to the state law for the purpose of converting a judgment not on its face final into one final in character was the dominating reason leading to the establishment of the principle that the form of the judgment was controlling for the purpose of ascertaining its finality. *Norfolk Turnpike Co. v. Virginia*, 225 U. S. 264, 268."

In *Western Union Tel. Co. v. Priester*, 276 U. S. 252, the Court granted a writ of certiorari to an Alabama intermediate appellate court because "the Supreme Court of Alabama, by denying the petition for certiorari, on the face of the record did not pass on the merits."

The fact that a State Supreme Court may state, as a reason for its refusal to review the judgment or decree of a lower State court, that it believes that the decision of the lower court is correct does not "take from the refusal its ostensible character of declining jurisdiction." *American Railway Express Co. v. Levee*, 263 U. S. 19, 21; *Western Union Tel. Co. v. Crovo*, 220 U. S. 364, 366; *Virginia Railway Co. v. Mullins*, 271 U. S. 221, 222.

If this Court should now decide (*Louisiana Nav. Co. v. Oyster Comm.*, 226 U. S. 99, 101, and the other cases referred to, to the contrary) to test the question by importing into the face of the record the provisions of the Texas statute (Article 1728), the Court of Civil Appeals would nevertheless remain the highest court of the State that could decide this case. The play of the statute upon the order refusing the writ can hardly be regarded as a higher token of approval than would be an accompanying opinion of the Supreme Court in terms declaring that the application was refused because the court believed that the decision below was correct. This Court has repeatedly taken jurisdiction of cases coming directly from the Courts of Civil Appeals where the Texas Supreme Court has accompanied its order of refusal by an opinion stating its reasons for refusing to review the case and showing its concurrence with the views of the court below. The following cases are examples: *M. K. & T. R. Co. v. Texas*, 245 U. S. 484 (same case, 107 Texas 540); *G. C. & S. F. Ry. Co. v. Texas*, 246 U. S. 58 (same case, 107 Texas 544); *M. K. & T. R. Co. v. Cassady*, 242 U. S. 611 (same case, 108 Texas 461); *T. & N. O. R. Co. v. Neill*, 301 U. S. 674 (same case, 128 Texas 580, 100 S. W. (2d) 348). The motion to dismiss in *T. & N. O. R. Co. v. Neill* was grounded in part on the fact that the State Supreme Court had written an opinion assigning as the reason for its refusal of a writ the fact that it believed the decision below was correct.

If authority were needed to show that appellees are mistaken in ascribing to inadvertence (motion, p. 9) the repeated action of this Court, in cases com-

ing here from Texas, it would be sufficient to refer to the opinions by Mr. Justice Holmes in *M. K. & T. Ry. Co. v. Texas, supra,* and *G. C. & S. F. Ry. Co. v. Texas, supra,* and to his later opinion in *American Express Co. v. Levee,* 263 U. S. 19, where the point was specifically dealt with, at p. 21.

It expressly appears from the record that the order of the State Supreme Court refusing the application for writ of error was not a judgment on the merits. Appellant in its application requested the State Supreme Court "to issue its writ of error * * * directed to the Court of Civil Appeals * * * to the end that this case may be removed from said Court of Civil Appeals to this Court and the record and proceedings herein may be fully reviewed by this Court and the judgment of the said Court of Civil Appeals rendered herein may be reversed and that of the District Court affirmed." (V, R. 3407.)

The order of the Supreme Court of Texas refusing the application reads:

"This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that the application be refused; that applicant, Lone Star Gas Company, pay all costs incurred on this application. (No opinion filed.)" (V, R. 3435.)

Appellant then, as permitted by the rules of the State Supreme Court, filed its motion for rehearing and therein prayed "that the order of the Court refusing said Application be set aside and that the Application be granted on rehearing * * *." (V, R. 3436.)

On December 30, 1936, the State Supreme Court entered its order that said motion for rehearing "be and it is hereby in all things overruled"; the order further reciting that this was done "after due consideration of same." (V, R. 3456.)

The clerk of the State Supreme Court has certified that on the date the motion was overruled, he returned to the clerk of the Court of Civil Appeals "the entire record in said cause," excepting only the papers constituting the record made on the application for the writ. (V, R. 3457.) And the clerk of the Court of Civil Appeals has certified that on the same date the clerk of the State Supreme Court returned to the Court of Civil Appeals "the entire record in said cause," excepting only the record made in the Supreme Court on the application for the writ; and further, that said record "now permanently remains" in the Court of Civil Appeals. (V, R. 3489.)

The original record forwarded to the Supreme Court of Texas in connection with the application for writ of error, and later returned to the Court of Civil Appeals, has been filed in this Court under a stipulation of the parties and an order of the Court of Civil Appeals. (V, R. 3485.) The order referred to was omitted in printing, but it appears in the original record, at p. 340.

There is nothing here plainly showing "on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits." *Norfolk & Suburban Turnpike Co. v. Virginia, supra.*

The order of the court did not dispose of the case but only of the application for the writ. No judgment was entered setting forth and establishing the rights of the parties. That such was the character of the State Supreme Court's action is further indicated by the fact that on the day that its action became final, (Dec. 30, 1936) it caused the entire original record, excepting only the record made on the application, to be returned to the court that rendered the judgment which it had declined to review. It hardly can be supposed that it would have permanently surrendered the record in a case decided on the merits. Under a standing rule of the court, enforced by it "without exceptions," no record in a case already decided on the merits may be taken from the office of its clerk. *Hart v. West*, 92 Texas 416. In contrast, Rule 4 of the court requires its clerk, after its action in refusing a writ of error has become final, to return to the Court of Civil Appeals "the papers which belong to that court," retaining the petition for writ of error. Supreme Court Rules, 121 Texas 748. These rules clearly recognize that the court's refusal of a writ of error is not a decision of the case on the merits. If it were, the record, under the court's rules, would remain in the office of its clerk.

III.

The Court of Civil Appeals Has the Record, and for That Reason the Appeal Was Properly Taken From That Court.

By the law of the State, the record in a case decided by the Court of Civil Appeals is returned to

the Court of Civil Appeals when the Supreme Court refuses an application for writ of error, and it permanently remains in that court. An applicant for the writ is required to deposit with the clerk of the Court of Civil Appeals, at the time the application is filed, a sufficient amount to cover the cost of transporting the record to and from the Supreme Court. Article 1743, R. S. 1925; Appendix, p. 25. Rule 4 of the Supreme Court above referred to provides that, after the court's refusal of a writ of error has become final, its clerk shall return to the Court of Civil Appeals "the papers which belong to that court," retaining the petition for writ of error. (121 Texas 748.)

The applicable statutes and rules were followed in this case. As expressly appears from the certificate of the clerk of the Supreme Court of Texas and of the clerk of the Court of Civil Appeals, (*supra*, p. 11), "the entire record," other than that made on the application for writ of error, was returned to the Court of Civil Appeals "where it now permanently remains." (V, R. 3489.)

Since, under the State law and in fact, the record permanently remains in the Court of Civil Appeals, the appeal was properly taken from that court. *Atherton v. Fowler*, 91 U. S. 143, 146; *Polleys v. Black River Imp. Co.*, 113 U. S. 81; *Hodges v. Snyder*, 261 U. S. 600; *McDonald v. Massachusetts*, 180 U. S. 311, 312; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 200; *Lee v. Johnson*, 116 U. S. 48, 49.

In *Stanley v. Schwalby*, 162 U. S. 255, 269, Mr. Justice Gray, writing the first opinion of this Court

in a case coming from a Texas Court of Civil Appeals, said:

> "A petition for writ of error to the Court of Civil Appeals having been presented to the Supreme Court of the State, and denied, the present writ of error from this Court was properly directed to the Court of Civil Appeals, in which the record remained."

The rule laid down in the earlier cases was approved in *Van Huffel v. Harkelrode*, 284 U. S. 225, 230.

IV.

Under the State Law an Order of the Supreme Court Refusing Writ of Error Is Not a Judgment Disposing of the Case on Its Merits.

If resort properly may be had to the State law to determine the nature of the action taken by the State Supreme Court in refusing a writ of error, then it is submitted that, under the State law, such an order is not a judgment of the State Supreme Court disposing of the case on the merits. It represents, not a review and decision of the case on the merits, but a refusal to thus review it. Such an order disposes, not of the case, but of the party's asserted right to further appeal the case. As declared by the State Supreme Court, it is a discretionary denial of "the right to entrance" to the Supreme Court of Texas. *S. A. & A. P. Ry. Co. v. Blair*, 108 Texas 434, 439.

The decision of the court in that case was later followed in the case of *Gatz v. City of Kerrville*, 121 Texas 92.

The Constitution of Texas provides:

"The Supreme Court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and the concurrence of two judges shall be necessary to the decision of a case." *Article 1, Section 2.*

It is obvious that if the refusal of an application for writ of error constituted the "decision of a case," the power could be exercised only by the Supreme Court itself and with the concurrence of two of the judges. The Supreme Court of Texas has held that the refusing of an application for writ of error is not the "decision of a case" and that the power to act on such application may be devolved by the Legislature upon other and special agencies created by it.

In 1917 the Legislature authorized the Chief Justice of the Supreme Court of Texas, or the two associate justices, to appoint a committee of three justices selected from the Courts of Civil Appeals, and authorized this "committee of judges" to pass upon applications for writs of error filed in the Supreme Court of Texas. This statute as it appears in the Texas Revised Civil Statutes of 1925 is copied in the appendix, p. 26. The validity of the act was challenged upon the ground that the refusing of an application for writ of error constituted the "deci-

sion of a case" and that such power could be exercised only by the Supreme Court. The act was upheld by the Supreme Court upon the ground that it regulated merely "the right of appeal to the Supreme Court," that is, the "right to entrance" to the Supreme Court; and that the Legislature had the power to vest in the Supreme Court itself "or in some other authority the discretionary power of deciding whether the appeal shall lie." *S. A. & A. P. Ry Co. v. Blair*, 108 Texas 434, 439. The court compared the statute to the Federal statute "which empowers the chief justice of a State Supreme Court to grant a writ of error in a certain class of cases as a means for their review by the United States Supreme Court." *108 Texas 434, 438.*

In 1930 the Legislature enacted another statute authorizing the State Supreme Court to appoint a commission consisting of six commissioners to assist the court in disposing of its work. Pertinent parts of this statute are copied in the appendix, pp. 26-7. These commissioners are not members of the Supreme Court and have no vote on any "decision of a case" by the Supreme Court. But this Act provided that any two of the commissioners appointed, "acting with one member of the Supreme Court, shall be authorized to pass on all applications for writs of error presented from the Courts of Civil Appeals and that action of said two commissioners and one member of the Supreme Court in passing upon such applications shall be given the same force and effect as if the same were passed upon by the Supreme Court itself."

This statute was passed, as will be noted, three years after the Legislature, by the act of 1927, had

provided that the refusing of a writ of error by the Supreme Court should evidence its approval of the judgment and opinion of the Court of Civil Appeals. The act of 1927 is the statute upon which appellees ground their claim that the Supreme Court's refusal of a writ of error is a "decision of a case" on the merits. The act of 1930 was challenged on the ground that the refusal of a writ of error was a "decision of a case" on the merits and that, under the State Constitution, such decision could be made only by the Supreme Court itself; that the power to decide a case on the merits could not be given to one judge of the Supreme Court and two commissioners. The act was upheld by the Supreme Court in *Gatz v. City of Kerrville, 121 Texas 92*, upon the ground that it merely prescribed "the method of admitting cases to the Supreme Court." *S. A. & A. P. Ry. Co. v. Blair*, 108 Texas 434, was expressly approved and the court declared that that case "applies with equal force to the act now under review." (121 Texas 93.)

It thus appears that the Supreme Court of Texas has expressly held that the act of 1927, upon which the appellees here rely, was not effective to convert an order refusing a writ of error into a judgment of the Supreme Court disposing of a case on the merits.

The provision of the act last referred to, to the effect that the action of the special agency, composed of one Supreme Court judge and two commissioners, in passing upon such applications "shall be given the same force and effect as if the same were passed upon by the Supreme Court," clearly points to the nature of the action of the court itself in refusing

an application for writ of error. By force of the statute, the refusal of the writ by the court is of no higher dignity than is a refusal by a single judge of the court and two commissioners. They are reduced to a common level. That could not be true if the refusal of the writ amounted to a decision of the case on its merits, for under the Constitution only the Supreme Court itself may decide a case on the merits.

It thus appears that in the Texas judicial system there are five agencies empowered to pass upon applications for writs of error: (1) The Supreme Court itself; (2) a committee of judges from the Courts of Civil Appeals; and (3) Three committees or commissions, each composed of one Supreme Court judge and two of the six commissioners aiding the Supreme Court. The effect of the action is the same in each case. The action determines in a discretionary way the applicant's "right to entrance" to the Supreme Court. *Railway Company v. Blair*, 108 Texas 434, 439.

The effect of refusing an application for writ of error is described in Article 1750; "The refusal or dismissal of an application shall have the effect of denying the admission of the cause into the Supreme Court." (Appendix, p. 27.) The filing of the application stays the enforcement of the judgment of the Court of Civil Appeals only pending the Supreme Court's action on the application. Article 1864, R. C. S. 1925.

When the Supreme Court's action in refusing the writ becomes final, certified copies of the order of the court are forwarded to the Court of Civil Appeals and the record is returned; and then the clerk

of that court is empowered to issue the mandate of that court to enforce its judgment. (Article 1864; Rule 66, of the Courts of Civil Appeals, 102 Texas xxxvi.) The mandate of the Supreme Court will issue, not to enforce its orders refusing writs of error, but only its final judgments. (Article 1773, R. C. S. 1925.)

Article 1756 provides that trials in the Supreme Court "shall be only upon the questions of law upon which the writ of error was allowed"—this clearly showing that a trial on the merits takes place in that court only after action on the application and only if it is granted.*

No change in the established Texas practice has been worked by the amendment of the Texas statute (Article 1728, R. C. S. 1925) referred to in the motion to dismiss (pp. 5-6). The Supreme Court of Texas has so held. *Gatz v. City of Kerrville*, 121 Texas 92. In that case it declared that the rule laid down in *Railway Company v. Blair*, *supra*, was still applicable; that these statutes merely relate to the "method of admitting cases to the Supreme Court," and that the reasoning in the Blair case "applies with equal force to the act now under review."

The last three cases listed above (p. 4) were brought to this Court after the effective date (June 15, 1927) of the statute upon which appellees ground their motion. Certiorari has been denied, not dismissed, in a larger number of cases sought to be brought up during the same period.

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*The court maintains two dockets; one, the application docket and the other, the cause docket. No case is docketed as a cause until the application is granted. Rules 2, 8, 121, Texas 747, 750.

The fact that under the act of 1927 the refusal of a writ imports an approval of the opinion of the Court of Civil Appeals as a precedent as well as an approval of its judgment is without effect. Since 1893 the refusal of an application has amounted to an approval of the judgment. *Brackenridge v. Cobb*, 85 Texas 448, 450. The approval of the opinion as a precedent, implied under the force of the present statute, is immaterial in determining the jurisdiction of this Court. That jurisdiction exists and is exercised to review the "final judgment" of the highest court of the State to which the case could be taken. This Court has no concern with the opinions of the State court except as they may explain the reasons underlying its judgments. Furthermore, as we have pointed out, many cases have been brought here where the State Supreme Court had written opinions approving the decisions of the court below. Appellees would ascribe greater effect to the approval of the opinion of the court below, implied by force of the statute, than to an express approval evidenced by an opinion of the State Supreme Court.

Counsel have conceded that in the case of *Adams v. Saenger* (No. 197, October Term, 1937) the appeal was correctly taken from the Court of Civil Appeals because the Supreme Court of Texas in that case dismissed the application for want of jurisdiction, as authorized by Article 1728 (Appendix, p. 27.) Under that statute such dismissal imports an approval of the judgment of the Court of Civil Appeals but not an approval of its opinion. Such an order is indistinguishable from an order refusing writ of error in so far as either of them express an

approval of the judgment below. In either event this Court reviews the judgment of the Court of Civil Appeals and not its opinion. In neither instance does it plainly appear on the face of the record "by an affirmance in express terms of the judgment" that the refusal or dismissal amounted to an exercise by the State Supreme Court "of its jurisdiction to review the case on the merits," under the rule laid down in the Norfolk Turnpike Company case; and in neither case does the record remain in the possession of the Supreme Court.

Cases coming up from Ohio are cited in the motion, p. 5. As to these, it should be sufficient to say that the rule applicable to Texas cases is settled, and whether it is consistent or inconsistent with the rule applicable to Ohio cases is not material. But we think the Ohio cases are distinguishable. In Ohio, review of cases by the Supreme Court is a matter of right—right of the litigant and not discretion of the court. The action of the Supreme Court here is discretionary; the applicant is not entitled to have his case reviewed on the merits as a matter of right. Furthermore, in the Ohio cases, the statements, importing the consideration and decision of the case on the merits, were found in the judgment of the court. In each instance the proceedings had the form of a final judgment rendered by the Supreme Court of Ohio. Here, we have merely orders denying the party's right "to entrance" to the Supreme Court of Texas.

Appellees strongly rely on the opinion of the Commission of Appeals in *Gammel-Statesman Publishing Co. v. Ben C. Jones & Company*, 206 S. W. 931,

copy of which was attached to the motion to dismiss in the Laredo Gas Rate case. The case is clearly distinguishable. The facts were that the Court of Civil Appeals, after the expiration of the term at which it had rendered judgment and after the Supreme Court had refused a writ of error, attempted to set aside its judgment, already final, and to substitute another and different judgment for it. The aggrieved party then applied for a writ of error, contending that the second judgment of the Court of Civil Appeals was void because entered after the first judgment had already become final and beyond its control. That, as stated by the court, was "the only question presented for review." (206 S. W. 932.)

The case is authority for the proposition that the second judgment, rendered after the first judgment had become final and when the court no longer had authority to change it, was void, and that the Supreme Court had jurisdiction on writ of error to adjudge that it was void.

Nothing else was decided in the Gammel-Statesman Publishing Company case. We respectfully submit that the opinion does not hold what it is construed as holding on pages 6 and 7 of the motion. It does not hold that an order refusing writ of error is a judgment of the Supreme Court disposing of the case on the merits.

Furthermore, it will be noted that while the Supreme Court approved the "holding" of the Court of Civil Appeals on the single question presented for review, it did not approve everything said in the opinion. That explains the fact that the opinion was not reported in the official reports of the Supreme Court of Texas.

Adopted opinions are officially reported. Examples are *Weatherly v. Jackson*, 123 Texas 213, *Carey v. Looney*, 113 Texas 93. The limited effect, as authoritative precedents, of opinions not adopted by the Supreme Court and, in consequence, not officially reported, was explained in *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Texas 160, 167.

The Court has adopted in respect of cases from Texas the only practicable rule. If this Court should attempt to review the judgment of the Supreme Court of Texas in the instant case (assuming the existence of such a judgment) and should conclude that the reversal of the trial court judgment was wrong, how would this Court proceed to correct it? Presumably, by reversing the action of the Texas Supreme Court in refusing writ of error and by sending the case back to that court for further proceedings not inconsistent with the opinion of this Court. What, then, could the Texas court do? Only set aside its order refusing writ of error and substitute one granting writ of error, and requiring the Court of Civil Appeals to send up the record to the State Supreme Court, to the end that the latter court might proceed to reverse the judgment of the Court of Civil Appeals. This would be to invoke needlessly the offices of the State Supreme Court in reaching the result desired, namely, the reversal of the judgment of the Court of Civil Appeals. Why should this Court adopt such cumbersome, indirect methods to accomplish the reversal of the judgment of the Court of Civil Appeals?

As we have before pointed out, the Supreme Court of Texas has held that the refusing of a writ of error

does not constitute a judgment of the Supreme Court. It constitutes merely the action of the judges who sit in passing on the application, and determines only the right of the party to have his case reviewed in the Supreme Court of Texas. This being true, the effect of this Court's judgment of reversal, if the case had been taken from the Supreme Court of Texas, would be to compel the Supreme Court to render a judgment in a case in which theretofore none had been rendered by it. This would not be to *review* a judgment of the highest court of the state under Section 237 of the Judicial Code, but would be to reverse the *action* of the *judges* who refused the writ in not functioning in such a way as to bring into play the Supreme Court's jurisdiction over the case.

The motion to dismiss is without merit. Appellant prays that it be denied.

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APPENDIX.

Applicable Texas Statutes.

(These statutory provisions, unless otherwise indicated, are copied from Texas Revised Civil Statutes of 1925, with the latest amendments. Only relevant portions of each article or section are included.)

"Art. 1739. **Good cause to be shown.**—The Supreme Court may review final judgments of Courts of Civil Appeals upon writ of error, when good cause therefor be shown by application for such writ, as hereinafter required, the sufficiency of such cause to be determined as herein provided."

"Art. 1740. **Petition for writ of error.**—A writ of error before the Supreme Court may be applied for by petition addressed to said Court, stating the nature of the case and the grounds upon which the writ of error is prayed for, and showing that the Supreme Court has jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the Supreme Court."

"Art. 1743. **Petition with record.**—The petition with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals and copy of the appeal or supersedeas bond shall be filed with the Supreme Court. The party applying for the writ of

error shall deposit with the clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the record to and from the clerk of the Supreme Court, which sum shall be charged as costs in the suit."

"Art. 1748. **Designation of Civil Appeals Justices.**—The Chief Justice of the Supreme Court or any two Justices thereof may, by a writing recorded in the minutes of the Supreme Court, designate three of the Justices of the Courts of Civil Appeals to act as hereinafter provided. Such powers may be exercised from time to time in the same manner as long as reason therefor may exist, and the personnel of the designated Justices of the Courts of Civil Appeals may be changed as often as may be advisable, by relieving one, or more, and designating another, * * * * *."

Act of 1930—* * * "The Supreme Court of this State is hereby authorized to appoint a Commission, to be composed of six attorneys at law, having those qualifications fixed by the laws and Constitution of this State for the judges of the Supreme Court of Texas, which Commission shall be for the aid and assistance of said court in disposing of the business before it; and such Commission shall discharge such duties as may be assigned it by said Court. * * * *" (Sec. 1, Ch. 2, Acts 5th Called Session, 41st Leg., p. 112.)

"Two of said Commissioners designated by the Supreme Court acting with one member of the Supreme Court shall be authorized to pass upon all

applications for writs of error presented from the courts of civil appeals, and the action of said two Commissioners and one member of the Supreme Court in passing upon such applications shall be given the same force and effect as if the same were passed upon by the Supreme Court; provided, upon any application in which the three judges are not unanimous, the same shall be determined by the Supreme Court." (Ibid, Sec. 5, p. 113.)

"Art. 1750. **Effect of granting or denying writ.**—The granting of an application shall admit the cause into the Supreme Court to be proceeded with by the Court as provided by law. The refusal or dismissal of an application shall have the effect of denying the admission of the cause into the Supreme Court, except that motions for rehearing may be made to such designated justices in the same way as such motions to the Supreme Court have been heretofore allowed. The refusal or dismissal of any application shall not be regarded as a precedent or authority."

"Art. 1728. * * * *

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction. * * * *"

"Art. 1756. **Trial on questions of law.**—Trials in the Supreme Court shall be only upon the questions of law upon which the writ of error was allowed, or which were certified to the Supreme Court from a Court of Civil Appeals. * * * *"

"Art. 1864. **Mandate issued when.**—If no writ of error be sued out, or motion for rehearing be filed, within thirty days after the decision of the court has been entered in a Court of Civil Appeals, the clerk of the court shall, upon application of either party and the payment of all costs, issue a mandate upon said judgment."

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